Supreme Court, U.S.
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(3)

No. 00-1356

In The

Supreme Court of the United States

DONALD C. HAYHURST, JANE DOE HAYHURST,

Petitioners,

v.

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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38pp

PARTIES TO THE PROCEEDING

Petitioners are Donald C. Hayhurst; Patricia Hayhurst; and the American Academy of Naturopathic Physicians.

Respondent is the American Association of Naturopathic Physicians.

CORPORATE DISCLOSURE STATEMENT

There are no parent or publicly held companies owning 10 percent or more of the stock in the American Association of Naturopathic Physicians.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions cited by Petitioner, the following rules are involved.

Federal Rule of Civil Procedure 12(g) states in pertinent part:

> If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted. . . .

Federal Rule of Civil Procedure 12(h)(1) states in pertinent part:

> A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g). . . .

STATEMENT OF THE CASE

AANP generally agrees with Petitioners' statement of the case, but believes it should be supplemented with the following details pertinent to the questions presented.

For more than a decade, Petitioner Hayhurst has unfairly competed with Respondent AANP by creating numerous organizations having names that are confusingly similar to AANP. Though Hayhurst has often appeared *pro se*, he has hired multiple attorneys and is no stranger to the courts. Throughout this period, his course

of conduct has reflected an intent to cause harm to AANP and disrespect for the rules of the courts.

In October, 1991, AANP filed a complaint in the Western District of Washington against Hayhurst and a corporation he controlled, alleging unfair competition and trademark infringement. On December 2, 1992, the court permanently enjoined Hayhurst in his capacity as an officer of the corporation from further use of the names "AANP" or "American Association of Naturopathic Physicians." S. App. 3-5.[1]

Despite the permanent injunction, Hayhurst later formed a different entity, the American Academy of Naturopathic Physicians. Although the name was slightly different from plaintiff AANP's American *Association* of Naturopathic Physicians, many consumers would likely overlook the difference. Worse yet, both names are abbreviated AANP. Hayhurst used the AANP mark in mailings to consumers advertising services and promoting a national convention for naturopathic physicians. App. 32. Hayhurst also obtained an Internet domain name registration for aanp.com. S. App. 6. The aanp.com Internet site liberally used the AANP mark in offering services in competition with AANP.

After discovering Hayhurst's registration and use of the aanp.com domain name, AANP sent Hayhurst a cease and desist letter by registered mail. Apparently wary of receiving letters from law firms, Hayhurst refused to

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[1] References to "S. App." are to the appendix contained in this Opposition; references to "App." are to the appendix in the Hayhurst Petition.

accept the letter. AANP then enlisted Mr. Edward Gutierrez of the Central Process Service in Las Vegas to personally serve the letter. Gutierrez served Hayhurst and provided an affidavit of service. S. App. 7.

Hayhurst ignored the cease and desist letter, prompting AANP to file a lawsuit in the Western District of Washington. This time AANP hired a different process server, Legal Wings, Inc., to serve the summons and complaint. Legal Wings attempted service, but was unsuccessful. S. App. 8-9. AANP then returned to Gutierrez, who successfully served Donald Hayhurst (and therefore Patricia Hayhurst as well) on August 13, 1998. S. App. 10-11.

It was hardly surprising to AANP that Hayhurst was difficult to serve. Mr. Gutierrez testified that Donald Hayhurst was notorious for evading service. S. App. 12-13. Further, in a separate action between the parties, the U.S. District Court for the District of New Hampshire concluded that Hayhurst followed "an intentional pattern of avoiding service of process." S. App. 14-18, particularly at 16.

After Hayhurst failed to file a timely answer, AANP sought and obtained a default judgment. AANP again turned to Gutierrez to serve a copy of the judgment. Although Hayhurst had ignored all previous papers served upon him, the default judgment and permanent injunction got his attention. On January 25, 1999 – less than one week after service of the order on default judgment – Hayhurst filed a motion to set aside and vacate the default judgment.

The district court ordered an evidentiary hearing on the issue of service. Though Hayhurst technically appeared before the district court *pro se*, he had counsel assisting and advising him. Indeed, an attorney representing Hayhurst in another matter between AANP and Hayhurst called counsel for AANP to explain that Hayhurst was unlikely to attend the evidentiary hearing. Despite an express order from the district court, Hayhurst did not attend the hearing. Finding the process server's testimony to be credible, the district court denied Hayhurst's motion to set aside the default judgment.

On appeal, AANP argued that Hayhurst waived personal jurisdiction by not raising it in his first motion before the district court. AANP further argued that jurisdiction was proper in the district court in any event, under the rationale of *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998). Consistent with *Panavision*, Hayhurst's long-standing knowledge of AANP and his intent that the domain registration and use would have a harmful effect upon AANP within the state of Washington formed a sufficient basis for personal jurisdiction. Though the Ninth Circuit did not reach the long-arm jurisdiction question, it would have found in favor of AANP had it done so.

REASONS FOR DENYING THE PETITION

I. The Decision of the Court of Appeals does not Conflict with Prior Supreme Court or Ninth Circuit Decisions

Rule 12 unequivocally requires civil litigants to join all Rule 12 defenses together in a single motion. Failure to do so amounts to a waiver of all omitted defenses. Application of this rule to a motion seeking to set aside a default judgment is intended by the Civil Rules and is consistent with a long line of authority holding that personal jurisdiction may be waived.

Pro se civil litigants are not excused from following Rule 12 or other court rules, as this Court and the Ninth Circuit have repeatedly held. Moreover, the Ninth Circuit explained that Hayhurst in particular did not deserve leeway considering his behavior before the district court.

The Ninth Circuit also properly applied the standard for setting aside a default judgment. After dispensing with challenges to service and jurisdiction, the court concluded that there were no other bases under Rule 60(b) that compelled the default to be set aside. This conclusion was properly based on the absence of a meritorious defense and Hayhurst's evasion of service of process.

Finally, nothing in the ruling below conflicts with Ninth Circuit or Supreme Court precedent regarding jurisdiction over Mrs. Hayhurst. As the Ninth Circuit held, Mrs. Hayhurst waived any challenge to personal jurisdiction by omitting it from her initial motion raising other Rule 12 defenses.

A. The Waiver Provisions Of Rule 12 Also Apply To Motions Pursuant To Rule 55

There is a rich tradition under Rules 12(g) and (h) of the Federal Rules of Civil Procedure requiring that certain procedural defenses must be raised in a single motion or in a responsive pleading. The requirements of Rule 12 are straightforward: whether by responsive pleading or by motion, all Rule 12 defenses must be joined together.

Rule 12 must be read with Rules 55 and 60, as the Ninth and Seventh Circuits have done. *See O'Brien v. O'Brien & Associates, Inc.*, 998 F.2d 1394, 1399 (7th Cir. 1993); *American Association of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104 (9th Cir. 2000). Hayhurst cites no authority – and AANP is aware of none – holding that Rule 12 need not be followed after a default is obtained.

The express language of Rule 12 addresses motions of the identical type filed by Hayhurst. Indeed, even as a *pro se* litigant Hayhurst understood his motion to be governed by Rule 12. Hayhurst expressly stated in the motion that relief was requested pursuant to Rule 12(b)(5). S. App. 1.

The separate requirement in Rule 12 that answers must be filed within 20 days of service is of no consequence. As an initial matter, litigants routinely file answers much later, either by stipulation or other court order. Moreover, the assertion that motions raising Rule 12 defenses must be made within 20 days of service is a proposition found neither in the rule nor in the case law. Considering that the consolidation provision of Rule 12 has existed since the 1937 adoption of the Civil Rules, if

Rule 12 were interpreted to require a Rule 12(b) motion to be filed within 20 days of service, Hayhurst would easily have found supporting authority. AANP is aware of no such authority, and Rule 12(b) motions need not be filed within 20 days of service.

Nor does the Ninth Circuit ruling below offend Due Process. Hayhurst makes much of the right to collaterally challenge a default judgment on jurisdictional grounds, citing *Pennoyer v. Neff*, 95 U.S. 714 (1877) and other decisions. But just as a defendant must be allowed to challenge personal jurisdiction, a defendant can waive it.

Personal jurisdiction is "a legal right protecting the individual" that the defendant may waive. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704, 102 S.Ct. 2099, 2105, 72 L.Ed.2d 492 (1982). As a personal right, "a party may insist that jurisdictional limitations be observed, or may forgo that right, effectively consenting to the court's exercise of adjudicatory authority." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584, 143 L.Ed.2d 760, 771 119 S.Ct. 1563 (1999). Thus, consistent with long-standing precedent, Hayhurst was free to challenge personal jurisdiction, but was required to do so in the first Rule 12 motion before the district court. Because Rule 12 was violated, Hayhurst waived the right to challenge the judgment on the basis of personal jurisdiction.

B. The Ninth Circuit Ruling Is Consistent With Supreme Court And Ninth Circuit Precedent Regarding Pro Se Litigants

As a *pro se* litigant, Hayhurst was not entitled to relief from the requirements of Rule 12. There is no dispute that judges can give *pro se* litigants some leeway with respect to certain administrative rules. The question here, however, is whether a judge *must* allow a litigant to circumvent the rules in a civil case. Hayhurst cites no authority, and AANP is aware of none, holding that the Rules of Civil Procedure must be overlooked under the facts of this case.

This Court has "never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel." *McNeil v. United States*, 508 U.S. 106, 113, 113 S.Ct. 1980, 1984, 124 L.Ed.2d 21 (1993). To the contrary, "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826, 65 L.Ed.2d 532, 100 S.Ct. 2486 (1980).

Ninth Circuit precedent similarly requires *pro se* litigants to follow the civil rules, concluding that it cannot "supervise laymen in the practice of law." *Springer v. Best*, 264 F.2d 24, 25 (9th Cir. 1959). The Ninth Circuit explicitly has warned against "becoming a player in the adversary process rather than remaining its referee." *Jacobsen v. Filler*, 790 F.2d 1362, 1365 (9th Cir. 1986) ("It is not for the trial court to inject itself into the adversary process on behalf of one class of litigant."). Accordingly, "a pro se

litigant is not excused from knowing the most basic pleading requirements." *American Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104 (9th Cir. 2000) (citing *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 382 (9th Cir. 1997)). In sum, *pro se* litigants in the ordinary civil case should not be treated more favorably than parties with attorneys of record. *Jacobsen*, 790 F.2d at 1364.

Moreover, the Ninth Circuit decision below does not conflict with this Court's ruling in *Haines v. Kerner*, 404 U.S 519, 30 L.Ed.2d 652, 92 S.Ct. 594 (1972). The *pro se* litigant in *Haines* was incarcerated, *id.* at p. 519, a factor that this Court has found compelling when considering whether procedural rules must be followed. *See Houston* v. *Lack*, 487 U.S. 266, 101 L.Ed.2d 245, 108 S.Ct. 2379 (1988). Petitioner Hayhurst is an ordinary civil litigant not entitled to the treatment afforded to inmates.

While *pro se* civil litigants in general need not be given special treatment, Hayhurst in particular was undeserving of such benefits. In the Petition for Certiorari, Hayhurst curiously asserts that the Ninth Circuit "discounted entirely the fact that the Hayhursts were proceeding *pro se*." Petition at p. 9. In fact, the Ninth Circuit expressly recognized the *pro se* status and explained why Hayhurst should not be given special benefits. The Court explained:

> As for the equities in this case, Hayhurst is on thin ice: despite receiving three notices concerning the status of this matter, he resolutely ignored the court and the Association until a judgment had been filed against him; then, when he did appear, he made protestations of

> innocence that were found to be wholly untrue by the district court.

App. 7. The Court further noted that "Hayhurst refused to appear before the magistrate judge" at the evidentiary hearing. App. 9. Even if *pro se* civil litigants should generally be granted leeway under the Civil Rules, Hayhurst's behavior before the district court makes it inappropriate to do so in this case.

C. The Ninth Circuit Properly Applied The Law Regarding The Defendants' Burden In Setting Aside A Default Judgment

Certiorari should not be granted as to whether the Ninth Circuit applied the correct standard for setting aside a default judgment. As Hayhurst observes, this ruling was dictum because it was unnecessary once the Ninth Circuit found personal jurisdiction to have been waived. This Court should not grant certiorari to scrutinize dictum.

Even if this Court were to review the Ninth Circuit's application of the standard for setting aside the default judgment, it would be sustained. In the appeal to the Ninth Circuit, Hayhurst argued improper service and lack of personal jurisdiction. By the time the Ninth Circuit turned to the request to set aside the default under Rule 55(c), it had already dispensed with the questions of jurisdiction and service. Accordingly, the Ninth Circuit was addressing whether the default judgment should be set aside on any other grounds not already addressed in Rule 12. As the court explained, such reasons might include any grounds enumerated in Rule 60(b). App. 9.

When considering those bases, the court need not have addressed personal jurisdiction because it had already found personal jurisdiction to be proper.

Finally, Hayhurst presented no facts that require the default judgment to be set aside under Rule 55(c). The allegedly meritorious defenses raised by Hayhurst were not even facially sufficient. Moreover, Hayhurst contributed to the default by evading service. Under the circumstances, the Ninth Circuit properly followed the precedent set in *In re Hammer*, 940 F.2d 524, 525-26 (9th Cir. 1991).

D. The Ninth Circuit Properly Upheld The Exercise Of Jurisdiction Over Mrs. Hayhurst

As the Ninth Circuit held, Mrs. Hayhurst is in the same situation as her husband with regard to the issues presented on appeal. App. 4 n. 1. Hayhurst misses the point in urging that the complaint is deficient. Mrs. Hayhurst appeared with Mr. Hayhurst in the initial motion seeking dismissal for improper service. In doing so, Mrs. Hayhurst waived personal jurisdiction in exactly the same manner as Mr. Hayhurst. Because the Ninth Circuit found that Mrs. Hayhurst waived personal jurisdiction, this Court should not grant certiorari to analyze the sufficiency of the complaint.

II. EVEN IF THE COURTS BELOW WERE TO REACH THE LONG-ARM QUESTION ON REMAND, THEY WOULD FIND JURISDICTION TO BE PROPER

A finding by this Court that personal jurisdiction was not waived would ultimately be futile. Hayhurst asserts that he merely maintained a passive Internet site accessible in Washington. Relying on *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997), Hayhurst suggests that the court may not exercise personal jurisdiction in such cases. But the Ninth Circuit explained in *Cybersell* that jurisdiction would be proper if there were "something more" in addition to a passive Web site, and if the forum state were the "focal point" of the harm suffered. *Id.* at 418.

The Ninth Circuit subsequently found "something more" in *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998). In *Panavision*, jurisdiction was proper because the registration of an Internet domain name was coupled with an intent to cause a harmful effect within the forum by offering to sell it to the trademark owner. *Id* at 1322.

Under the "effects" doctrine, jurisdiction is reasonable if the defendant's conduct is aimed at or has an effect in the forum state. *Id.* at 1321 (citing cases). Thus, personal jurisdiction can be based on (1) intentional actions; (2) expressly aimed at the forum state; (3) causing harm, the brunt of which is suffered – and which the defendant knows is likely to be suffered – in the forum state. *Core-Vent v. Nobel Indus. AB*, 11 F.3d 1482, 1456 (9th Cir. 1993).

Hayhurst's actions are sufficient to exercise jurisdiction. Hayhurst did not innocently register a domain name that happened to be similar to AANP's. Rather, Hayhurst intentionally adopted a domain name that he knew was identical to AANP's trademark so that Hayhurst could confuse consumers and take business from AANP. Hayhurst had previously known about AANP's business and its trademarks for many years, and had been ordered by another court not to infringe upon AANP's trade name and trademark rights. In view of the lengthy and litigious history between the parties, there is no doubt that Hayhurst intended to cause harm to AANP in Washington, and knew that his actions would in fact do so. Thus, under the effects doctrine, jurisdiction was proper. Because the courts below would ultimately find jurisdiction to be proper on remand, certiorari should be denied.

III. THE QUESTIONS PRESENTED DO NOT HAVE FAR-REACHING IMPLICATIONS

The Ninth Circuit decision is a simple and expected one, holding that the consolidation requirements for motions under Rule 12 apply even after a default judgment is entered. The ruling does not implicate *Pennoyer v. Neff* because defendants are still free to challenge personal jurisdiction so long as they follow long-established procedural requirements when doing so.

Nor is the Court presented with important questions regarding *pro se* litigants. Consistent with long-standing Supreme Court and Ninth Circuit precedent, Hayhurst was required to follow the Federal Rules of Civil Procedure. Though district courts can extend some leeway in

an *appropriate case, considering the* equities of this case it was well within the court's discretion not to do so.

Finally, nothing in the Ninth Circuit decision will encourage plaintiffs to arbitrarily name spouses as defendants. If there is no connection between the spouse and the dispute, spouses remain free to challenge the litigation on any available grounds.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent American Association of Naturopathic Physicians

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Defendants "Pro Se"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS,	Case No.: C98-1055C
Plaintiff,	**MOTION TO DISMISS**
vs.	
DONALD C. HAYHURST, d/b/a aanp.com and aannp.com; JANE DOE HAYHURST, and AMERICAN ACADEMY OF NATUROPATHIC PHYSICIANS,	
Defendants.	

COMES NOW, Defendant, DONALD C. HAYHURST and JANE DOE HAYHURST, *Pro Se*, who moves the Court pursuant to F.R.Civ.P. Rule - 12(b)(5) and states the following to-wit:

That with respect to this matter Defendants move for dismissal as Plaintiff's have not legally served Defendants as in accordance with Fed.R.Civ.P. - Rule 4(e).

Defendants assert that they were neither served by any form of process serving in this matter, nor, to the best of Defendants knowledge, has there been any publication of service for this matter in Defendants local periodicals. Accordingly, this matter should be dismissed for lack of proper service on Defendants as required by the Federal Rules of Civil Procedure.

WHEREFORE, DEFENDANTS PRAYS:

That the Court after reviewing all papers on file in this matter rules that Service on Defendants was not properly done and accordingly, orders that this matter be dismissed.

Respectfully submitted this 25th day of January, 1999.

/s/ D.C. Hayhurst Pro Se
DONALD C. HAYHURST
JANE DOE HAYHURST
Defendants "Pro Se"
P.O. Box 96273
Las Vegas, NV 89193
(702) 897-7053

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON AT SEATTLE

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS, a non-profit Oregon corporation Plaintiff, vs. DONALD C. HAYHURST, JANE DOE HAYHURST, husband and wife; and AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS, a non-profit Nevada corporation, Defendants.	NO. C91-1429Z ORDER GRANTING PLAINTIFF AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICANS' MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION (Filed Aug. 12, 1992)

THIS MATTER having come on for hearing before the undersigned judge of the above-entitled court, on Plaintiff's Motion for Summary Judgment, and the court having considered: (1) Plaintiff's Motion for Summary Judgment; (2) Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment; (3) the Declaration of John Weeks and Exhibits thereto; (4) the Declaration of Harry F. Swope, N.D.; (5) the Declaration of Carlo Calabrese, N.D. and Exhibits thereto; (6) the Declaration of Mark M. Hough and Exhibits thereto, and; (7) the Response of Defendants, and, no response having been filed, and being fully advised in the premises now does hereby:

ORDER, ADJUDGE AND DECREE that Plaintiff's Motion for Summary Judgment on its claims for Lanham Act Violations, Common Law Unfair Competition, Consumer Protection Act Violations, and trademark and service mark infringement is GRANTED.

It is further ORDERED that defendant corporation, defendant Hayhurst in his capacity as an officer, director or agent of defendant corporation, and their servants, agents, employees, attorneys and all persons in active concert and participation with them, immediately and permanently cease using the name "AANP" or "American Association of Naturopathic Physicians" or any colorable derivation thereof, in any capacity, and that defendant corporation and defendant Hayhurst, and their servants, agents, employees, attorneys and all persons in active concert and participation with them, immediately cease from filing the name "AANP" or "American Association of Naturopathic Physicians," or any colorable derivation thereof, as a corporate name, trade name, or service mark with any governmental agency, and that defendant corporation and defendant Hayhurst, and their servants, agents, employees, attorneys and all persons in active concert and participation with them, destroy all correspondence, letterhead, advertisements, brochures or other materials in the possession of defendant corporation or defendant Hayhurst, or their servants, agents, employees, attorneys and all persons in active concert and participation with them, which may use or carry the name "AANP" or "American Association of Naturopathic Physicians," or any colorable derivation thereof, and that defendant corporation immediately change its corporate name to something other than "American Association of

Naturopathic Physicians" or any colorable derivation thereof in all jurisdictions in which it has used said name.

IT IS FURTHER ORDERED that defendant corporation and defendant Donald Hayhurst pay to plaintiff corporation their costs and attorneys' fees in an amount which will be determined by this court upon application by plaintiff to this court.

Dated this 2nd day of December, 1992.

/s/ Thomas S. Zilly
HONORABLE THOMAS S. ZILLY

Presented by:

REED McCLURE

By Mark M. Hough
Mark M. Hough
David M. Dawson USBA 4578
Of Attorneys For Plaintiff

Whois Query Results

Registrant:
aannp.com AANP3-DOM
8170 S. Eastern Avenue, 4-133
Las Vegas, NV 89123
US

Domain Name: AANP.COM

Administrative Contact:
Hayhurst, Donald C DCH28
don@ANMAAMERICA.COM
(702) 897-7053

Technical Contact, Zone Contact:

Clature, Nomen CN54-ORG nomen@IUINC.COM
610-317-9370

Fax-610-317-9375
Billing Contact:
Hayhurst, Donald C DCH28
don@ANMAAMERICA.COM
(702) 897-7053
Record last updated on 19-Dec-97
Record created on 06-Oct-97.
Database last updated on 24-Jul-98 04:30:41 EDT.

Domain servers in listed order:

WOPR.IUINC.COM 205.147.201.3

DSN.IUINC.COM 205.147.201.4

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS Plaintiff vs. DONALD C. HAYHURST Defendant	)	Case No: _____ Docket No: _____ Dept. No. _____ **AFFIDAVIT OF SERVICE**

I, Edward E. Guttierrez, being first duly sworn, deposes and says: That your affiant is and was on the day he served the within action, a citizen of the United States, over 18 years of age, and not a party to, nor interested in, the within action;

That you affiant received the within SERVICE PACKET W/CERTIFIED COPY OF A TRADEMARK REGISTRATION on the 24 day of APRIL, 1998, and personally served the same upon

DONAD [sic] C. HAYHURST
8170 CREEK WATER LANE
LAS VEGAS, NV 89123

on the 28 day of APRIL, 1998 at 20:48 HRS, with the County of Clark, State of Nevada, with a copy of same.

/s/ Edward Gutierrez
Affiant

Registered Process Server
Nevada State License #289A

EXHIBIT 1

SUBSCRIBED AND SWORN to before me

this 30 day of APRIL, 1998

/s/ Catherine A. Sands
NOTARY PUBLIC in and for the County
of Clark, State of Nevada.

[SEAL]
Notary Public State Of Nevada
Certificate #95-0034-01
CATHERINE A. SANDS
My Appointment Expires
September 7, 19999

SER70

EXHIBIT 10

OUT-OF-TOWN

LEGAL WINGS, INC. SERVE #47734
618 South 6th Street CUSTOMER CHRI7
Las Vegas, NV 89101 384 [illegible] 07/31/98

Ref: AMERICAN
206 682-8100

Date 07/31/98 10:43

Bill To: CHRISTENSEN O'CONNOR JOHNSON
1420 FIFTH AVENUE SUITE 2800
SEATTLE
WA 98101-2347

Case: AMERICAN VS. HAYHURST C98-1055c
Attn:
Document: SUMMONS IN A CIVIL CASE; AND COMPLAINT FOR UNFAIR COMPETITION, TRADEMARK INFRINGEMENT, SERVICE MARK INFRINGEMENT, AND TRADE NAME INFRINGEMENT

Serve: DONALD C. HAYHURST, individually,
AT 8170 Creek Water Ln Las Vegas NV 89123

Windmill to Paradise – South 1st right

Due By: 07/31/98 2400

Date/Time: 00/00/00 By: Rains Alexander [CS]

PROCESS JUL 31 1998

Server Info: 7/31 Address is Mailboxes Etc. 7/31 per Twyla – put on hold til they call w/ new address

8/3 per Twyla – try at 8170 Creekwater Lane Las Vegas NV 89123 8/3/98 AUG 03 1998 7:25p (RA, CW) tt male [sic] through privacy screen door who stated no Hayhurst lives here – no further info – 8/5/98 LM on Twyla V/M to Rt call 8/6 TT Twyla said the person you spoke to was Hayhurst she said to – hold for now will call back w/ instructions
8/11 LM on Twylas V/M to Rt call
8/12 LM on Twyla's V/M to Rt call
8/13 TT Twyla said to hold will call when she get more information

RETURN OF SERVICE

Service of the Summons and Complaint was made by me[1]

DATE 8/13/98

NAME OF SERVER *(PRINT)*
EDWARD E GUTIERREZ

TITLE PROCESS SERVER/INVESTIGATOR

Check on box below to indicate appropriate method of service

[XX] Served personally upon the defendant. Place where served:
8170 CREEKWATER LANE
LAS VEGAS, NV 89123

[ ] Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein. Name of person with whom the summons and complaint were left: _____

[ ] Returned unexecuted: _____

[ ] Other *(specify):* _____

STATEMENT OF SERVICE FEES

[ILLEGIBLE] SERVICES TOTAL

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

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[1] As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

Executed on 8/13/98
Date

/s/ Edward Gutierrez
Signature of Server

P.O. BOX 4096
LAS VEGAS, NV 89127
Address of Server

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS,	)	Case C98-1055C
	)	May 12, 1999
	)	1:30 p.m.
Plaintiff,	)	
vs.	)	
DONALD C. HAYHURST, et al.,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID E. WILSON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

On Behalf of the Plaintiff: LAWRENCE D. GRAHAM
Attorney at Law

On Behalf of the Defendant: (No One in Attendance)

Caroline R. Castle
Official Court Reporter
(206) 553-1899

Proceedings recorded by mechanical stenography; transcript produced by computer.

* * *

[6] Gutierrez-Direct

A I was an active DEA agent with the Drug Enforcement Agency. And I did some casino security work in Las Vegas, also.

Q I take it that in the course of those duties, from time to time you've been called upon to testify in a court appearance such as this one?

A Yes, I have.

Q Did there come a time, over the course of the past year, when you were asked to serve documents upon the defendant in this case, Mr. Donald Hayhurst?

A Yes.

Q Prior to serving Mr. Hayhurst, had you any familiarity with him at all?

A I had a prior comment by my employer that he had served papers on him four years prior to that with a lot of problems; the reason being that he was very evasive and that he would have P.O. boxes and other places of residence that weren't his.

Q So I take it that you were not familiar with him personally, but you knew of his reputation through another.

A That's correct.

Q Let me ask you, please, to direct your attention to Exhibit 1. It should be the top paper on the stack that's before you bearing a sticker Planintiff's Exhibit No. 1. Do you see that?

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

American Association of Naturopathic Physicians

v. Civil No. 98-126-SM

Donald Hayhurst and American Naturopathic Medical Association

ORDER

(Filed April 1, 1999)

By order of March 4, 1999, defendant Hayhurst was granted ten calendar days to file affidavits and memorandum to attempt to demonstrate the "good cause" showing necessary to set aside an entry of default. Defendant Hayhurst's memorandum and affidavits were filed on March 15, 1999. Plaintiff's opposition was filed on March 23, 1999. The day or so by which each filing is late is forgiven.

Plaintiff seeks to set aside the default under Fed. R. Civ. P. 55(c). While the First Circuit has not adopted a precise formula to determine if there is "good cause" to set aside a default it has recognized some guidelines. *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 503 (1st Cir. 1996). The parties were asked to address these guidelines by affidavit and memorandum.

1. Willfulness of default.

Defendant, in his affidavit, swears that he did not have knowledge of the suit, did no avoid service and was unaware of any process server approaching his home or business. Furthermore, he avers that he was experiencing difficulties at the time of attempted service as a result of a

"mini stroke" and was having trouble reading without a magnifying glass. He also states that when he became aware of the suit he responded promptly. *See* document no. 9 (alleging that he filed his first motion to set aside default on the day he learned of the suit).

Plaintiff's affidavit and in its request for service by publication (document no. 3), set forth a contrary view. Plaintiff's counsel contacted defendant's counsel of record requesting acceptance of service. Defendant's counsel reported back that defendant refused to authorize acceptance of service. Plaintiff, on March 30, 1998, forwarded the Complaint, Notice of Lawsuit, and Request for a Waiver of Service to defendant by first class U.S. certified mail. The return receipt was signed but the letter was refused. A Nevada Constable was asked to make service at addresses previously supplied by defendant. The 3163 S. Eastern Avenue address turned out to be a vacant building. The 8170 Eastern Ave. address was a P.O. Box at "Mail Boxes, Etc." The given telephone numbers were a message taking answering service. Calls were not returned. The 8170 Creekwater Lane address visit by the Constable was responded to by a female who denied that the defendant lived at that address. The initial motion for default or for service by publication was mailed to defendant by certified mail on June 29, 1998. Service was made by publication. Additionally, on July 2, 1998 a web site announcement of the suit showed a posted response including the statement that "(n)either Dr. Hayhurst nor ANMA is aware of this lawsuit." Finally, plaintiff states, but has not substantiated with any attached pleadings (contrary to its memorandum statement) that the "traumatic health problem" claim is not new.

This court's records in *Donald C. Hayhurst, N.M.D. v. Robert Timberlake, et al.*, C-94-199-SD show that Hayhurst availed himself of this court's jurisdiction, lost on summary judgment, had his appeal thrown out by informal mandate and has an unsatisfied order of outstanding fees and costs of $11,342.92 against him. With an outstanding judgment against him he has reason to avoid this jurisdiction.

The evidence establishes an intentional pattern of avoiding service of process. Evasion of service of process however does not establish a willful default. The only evidence on the issue of willful default is that defendant did not appear in response to publication but he did respond within twenty days of the mailing to him of plaintiff's motion for default. In the absence of any evidence that defendant acquired actual knowledge of service by publication, the relatively prompt response to the motion for default belies a willful default.

2. Prejudice.

The prejudice which plaintiff alleges is the extraordinary cost and time delay caused by defendant's evasion of service of process. However, "(t)he issue is not mere delay, but rather its accompanying dangers: loss of evidence, increased difficulties of discovery, or an enhanced opportunity for fraud or collusion." *Federal Deposit Insurance Corporation v. Francisco Investment Corporation*, 873 F.2d 474, 479 (1st Cir. 1989). Plaintiff has failed to establish any evidence of these accompanying dangers.

3. Defendant's Explanation.

Defendant is not credible as to his assertions that he was unaware that plaintiff was attempting to make service. He is also not credible as to his claims of inadequate eyesight in view of the numerous and detailed pleadings he has filed and his acknowledged extensive internet activities. He is credible as to his lack of knowledge of service of process since he is not a fool and would not allow a default judgment of seven figures to occur.

4. Good faith.

Defendant's evasion of service of process, his litigious history, his unjustified request for a seven month extension to answer and his failure to pay the judgment against him in a suit he brought) [sic] lead me to conclude that he is not acting in good faith. He appears to be delaying. He also claims to be unable to pay the existing $11,000 judgment while claiming to be concerned about the sizeable judgment sought here.

5. Timing.

The motion(s) was (were) filed promptly.

6. Amount Involved.

Plaintiff is seeking a judgment in excess of $1,000,000.00. Whether defendant is judgment-proof or not, the size of the sum sought is such that it ought to be earned on the merits, not by default.

7. Meritorious Defense.

In view of defendant's prior lost claim in this court and his frivolous appeal of the judgment against him, the

defense asserted here may be viewed with skepticism. However, he has fully answered and has vigorously denied plaintiff's allegations. If true, his answers would be a defense. On the present pleadings no determination can be made as to the actual, as opposed to the possible, merit of defendant's defense. On its face the answer establishes a meritorious defense.

Balancing all of the facts, particularly as they relate to willfulness, prejudice and the merits of the defense, I find defendant Hayhurst has shown good cause to vacate the default. The motion (document no. 27) is granted. The damages hearing scheduled for April 14, 1999 is canceled.

SO ORDERED.

/s/ James R. Muirhead
James R. Muirhead
United States Magistrate Judge

Date: April 1, 1999

cc: Robert A. Backus, Esq.
Donald C. Hayhurst, *pro se*
Linda A. Theroux, Esq.